December 2, 2004

MEMORANDUM

TO: *Reviewing Coastal Program Agencies:*
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Alan D. Weber, VDH
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Catherine M. Harold, DCR-DCBLA
Frank Pleva, King William County

FROM: Charles H. Ellis III, DEQ-OEIR

THROUGH: Ellie L. Irons, Program Manager, DEQ-OEIR

SUBJECT: Proposed King William Reservoir Federal Consistency Certification: Issues raised in Public Hearing and Public Comments
DEQ-04-176F

cc: Ethel R. Eaton, DHR
Thomas A. Barnard, Jr., VIMS
J. Michael Foreman, DOF
Keith R. Tignor, VDACS

Introduction

As you know, DEQ's Office of Environmental Impact Review (OEIR) is coordinating the Commonwealth's review of the federal consistency certification for the King William Reservoir project proposed by the City of Newport News ("applicant" or "permittee"). The purpose of this memo is to obtain your responses to issues raised by the public. The Federal Consistency Regulations (Title 15, Code of Federal Regulations, Part 930) govern this review, through Subpart D, "Consistency for Activities Requiring a

Federal License or Permit" (sections 930.50 through 930.66). The Regulations require the State to provide public notice of the review and allow it to hold a public hearing (section 930.61(a)).

As you know, the focus of our review of any consistency determination (by a federal agency undertaking a project) or consistency certification (by an entity seeking federal permits, as here, or federal assistance) is to determine the extent to which the proposal is consistent with the Enforceable Regulatory Policies comprising the VCP and to ensure that the Advisory Policies of the VCP were considered. Of principal interest are the nine "Enforceable Regulatory Policies" which make up the VCP; these, with the agencies responsible for administering them, are:

- A. Fisheries Management (MRC and DGIF; VDACS joins on the TBT program)
- B. Subaqueous Lands Management (MRC for encroachments)
- C. Wetlands Management (MRC for tidal wetlands; DEQ Water Division and Regional Offices for non-tidal wetlands and water quality certification)
- D. Dunes Management (MRC)
- E. Non-point Source Pollution Control (DCR for Erosion Control)
- F. Point-source Pollution Control (DEQ Water Division and Regional Offices for VPDES and VWP water permitting)
- G. Shoreline Sanitation (Health Department)
- H. Air Pollution Control (DEQ Air Division and Regional Offices)
- I. Coastal Lands Management (DCR-DCBLA and localities for stormwater control and land use controls).

We have summarized issues raised by the public at the October 20, 2004 public hearing in Williamsburg during the public review period, which ended on October 29. We are asking appropriate agencies to address issues related to the coastal program(s) each agency administers. We have included copies of detailed public comments for your use in addressing the issues raised. In this memo, we ask questions which try to relate the issues to applicable Enforceable Policies and, in the cases of MRC and DEQ's Water Division, to applicable permits as well. However, our questions are intended to facilitate, but not to limit, your analysis of the issues raised in the public comments. We have indicated, as best we can, the origins of the issues in the accompanying public comments and the Public Hearing transcript ("Transcript"). Please analyze these issues, using the enclosures, and indicate the extent to which the project, as now proposed, is or is not consistent with the Enforceable Policies of the Virginia Coastal Program which you administer. If you wish to look at public comments not provided with this memo or at the Transcript, please let us know. **We are asking that you respond by December 10, 2004. If you are unable to meet this deadline, please inform us as soon as possible.**

Issues relating to Enforceable Policies of the VCP

A. Issues for DEQ Water Division relative to project consistency with Enforceable Policy C, Wetlands Management and (as appropriate) Enforceable Policy F, Point Source Pollution Control (both implemented through the Virginia Water Protection ("VWP") Permit)

Issue #1. the consistency certification fails to address wetland mitigation and potential impacts to Mattaponi River marshes. Specifically, scientists' review of the applicant's earlier wetland mitigation plan found that the plan would result in the loss of wetland benefits: natural filtering capabilities of non-tidal wetlands to remove excess nutrients from runoff. The earlier proposed wetland mitigation plan would not meet the "no-net-loss" standard. The final wetland mitigation plan, required by the VWP permit, has not been issued. A conceptual mitigation plan associated with the Corps of Engineers' Section 404 permit action is being issued for public comment ending February 1, 2005, according to the Corps of Engineers, North Atlantic Division.

Comments on this issue from: Ann Jennings, Chesapeake Bay Foundation ("CBF") (letter, pages 2-3), citing Darke, Daniels, Megonigal, Whittecar, "Evaluation of the King William Reservoir Final Wetland Mitigation Plan," report commissioned by CBF (pages 4-5).

Questions: Can the VWP permit be valid in the absence of an approved wetland mitigation plan? If not, is the proposed project consistent with the Wetlands Management enforceable policy?

Issue #2. According to the Georgetown University Law Center, Institute for Public Representation ("GULC-IPR"), the applicant failed to comply with deadlines in the December 1997 DEQ permit applicable to the following:

- Final, detailed wetland mitigation plan;
- Drought water conservation plan;
- Eco-monitoring plan;
- Salinity monitoring plan preceded by multi-dimensional modeling; and
- Operation and maintenance manual.

(Similarly, the applicant failed to comply with newly established deadlines for these plans in the December 2002 DEQ permit modification.) The applicant has not received a valid extension of the deadlines.

Comments on this issue from: GULC-IPR (letter, page 3; Transcript, pages 34-35); Southern Environmental Law Center letter (page 2); CBF letter (pages 2-3).

Question: Does the failure of the applicant to provide these plans mean that the applicant is in violation of the VWP permit? If so, is the project consistent with the Wetlands Management enforceable policy of the VCP?

Issue #3. The 2004 MRC permit prohibits water withdrawals from the Mattaponi River during months in which the river normally runs at high flows. The salinity impacts of the reduction of freshwater flows upon the tidal, freshwater wetlands along the Mattaponi River were evaluated in a 1991 VIMS study that was based on the City's original water withdrawal plan. It is not clear that the 1991 study sufficiently addresses the impact on freshwater flows resulting from the pumping scenario mandated in the 2004 MRC permit. However, the VWP permit requires a salinity monitoring plan (Special Conditions, page 8, item D.4), which has not been submitted.

According to CBF, the proposed project should not be determined consistent with the VWP permit without taking into account possible changes in salinity impacts of water withdrawals, since a salinity monitoring plan, not yet submitted, was one of the requirements of the permit.

Comments on this issue from: CBF letter (page 3).

Question: Please indicate how salinity impacts of water withdrawals were addressed in the VWP permitting process in the absence of a salinity monitoring plan.

Issue #4. The 2002 VWP permit modification requires a minimum in-stream flow below the dam at Cohoke Creek as measured at Scotland Landing (Special Conditions, page 3, item B). Unless the permittee has instituted mandatory emergency drought water conservation measures, water should not be withdrawn from the Mattaponi River whenever the freshwater in-flow is below the minimum required values. The minimum in-stream flows, once drought measures are in place, are 197.6 million gallons per day (mgd) from December 1 through May 31 and 98.8 mgd between June 1 and November 30. Typically, June 1 through November 30 are low-flow months. In addition, at the same time that minimum in-stream flows must be maintained, the permittee is required to maintain a safe yield in the reservoir.

The MRC is tasked with the protection of anadromous fish species, including the American shad. In order to provide protection to this species, the MRC included a permit condition (Condition #19) that requires that the permittee not operate its raw water intake structure from March 1 through July 31 (150-day pumping hiatus) in any year unless permitted to do so in accordance with the approved temperature triggers. Typically, March, April, and May are high-flow months.

Comments on this issue from: Kelly Place, Watermen's Associations (Transcript, page 58); VIMS report, June 25, 2004 (page 6); Alliance to Save the Mattaponi comments, (page 3, "Hiatus 1" heading); Mike Town, Sierra Club (Transcript, pages 40-41).

Question: The comments indicate that the permit conditions of the DEQ Water Division and of the MRC may be in conflict with each other. Can the permittee meet both the required pumping hiatus and the required minimum in-stream flow and maintain a safe water supply within the reservoir? Can these issues be resolved without violating the current (2002) VWP permit?

Issue #5. The impacts of the proposed project on in-stream flows, wetland losses, and salinity in the Mattaponi River appear greater than necessary for the project to meet projected water supply needs. It does not appear that the wetland impacts associated with the project have been avoided to the extent possible.

Comments on this issue from: Mr. Taylor, Wetlands Watch (Transcript, pages 60-61); Alliance to Save the Mattaponi (page 2, "Beneficial Use" and "Wetland non-tidal" and other headings).

Question: Please indicate how avoidance of impacts was addressed in the permitting process.

Issue #6. "Poison pipes" have been added to the project design since the issuance of the VWP permit, and sanctioned in the MRC permit, without any public input or study, according to public hearing participants. These pipes have been proposed to combat invasive species such as zebra mussels, but the chemical agent in the pipes may affect Cohoke Creek at the proposed dam site, or other waterways and marine resources.

There is no indication that the water quality impacts of proposed "poison pipes" have been evaluated by DEQ or by the public.

Comments on this issue from: Alliance to Save the Mattaponi (page 7, "poison pipe" heading); Kelly Place, Association of Virginia Watermen (Transcript, pages 56-7).

Question: Please discuss whether the proposed project can be determined to be consistent with the VWP permit or with the Enforceable Policies governing wetlands or non-point source pollution in the absence of such an evaluation. Will the addition of these pipes result in any discharge into state waters? If yes, is a Virginia Pollutant Discharge Elimination System (VPDES) permit required for such a discharge?

Issue #7. This would be the single largest permitted destruction of wetlands since passage of the Clean Water Act in 1972, and the wetland losses cannot be effectively

replaced. Moreover, the water needs have been reassessed downward since the initial estimates were made and the VWP permit was issued in 1997; the water yield that is proposed is about twice the currently anticipated need; and viable, less damaging alternatives for meeting future water needs have been identified. In short, the impacts of the proposed project are seriously out of proportion to the needs for the water it would produce.

Comments on this issue from: Sierra Club (letter, page 1 and Transcript, pages 38-39); Delegate Harvey Morgan's letter, read into Transcript (pages 16-17); Ann Jennings, CBF (Transcript, pages 30-31); Mike Town, Sierra Club (Transcript, page 38); Christina Wulf, Forest Watch (Transcript, page 26); Del. Harvey Morgan (Transcript, pages 16-17); Rep. JoAnn Davis (letter, read into Transcript, page 13-14); Alliance to Save the Mattaponi (pages 2-5). (See also Norfolk District, Army Corps of Engineers, Recommended Record of Decision, dated March 20, 2001, pages 65-68 on wetlands impacts, and 15-34 on need.)

Question: Please indicate how the scale of the project was addressed in relation to anticipated water needs in the VWP permit and permit modification processes.

B. Issues for DGIF and MRC relative to project consistency with Enforceable Policy A, Fisheries Management.

Issue 1. The water intake for the project, in the middle of the most productive part of the Mattaponi River for shad (the "worst possible location"), would withdraw as much as 1/3 of the river flow and might alter the salinity of the river to the detriment of the remaining, depleted shad population which is sensitive to changes in salinity. Adult shad spawning behavior and migratory patterns would be disrupted. The permit issued by MRC was based on inadequate information concerning these impacts of the project on the shad population in the Mattaponi River, in part because the applicant has not performed the multi-dimensional salinity study mandated by the VWP permit.

In addition, the requirement for a pumping hiatus can be lifted whenever there is a water emergency, which could conflict with the shad spawning season.

Comments on this issue from: Carl Custalow, Chief, Mattaponi Tribe (Transcript, pp. 5-8), Delegate Harvey Morgan (Transcript, pages 16-17), Christina Wulf, Va. Forest Watch (Transcript, page 27), Matt Rosenberg, GULC-IPR ((Transcript, page 35), Mike Town, Sierra Club (Transcript, pages 40-41), Kelly Place, Watermen's Associations (Transcript, pages 51, 54, 57-58), Eugene Rivara, Alliance to Save the Mattaponi (Transcript, page 64), Ron Hachey, King and Queen County (Transcript, page 65), Kitty Cox (Transcript, page 70).

Questions: Are the placement of the water intake and the amounts of water to be withdrawn consistent with the Fisheries Management Enforceable Policies administered by the Department and/or the Commission? Does the Department and/or the Commission consider salinity modeling in advising the Commission on its subaqueous bed encroachment permitting, and was any such advice given to MRC in regard to this project proposal?

Issue 2. According to GULC-IRP, the applicant has not responded to a concern voiced earlier by DGIF and the U.S. Fish and Wildlife Service and quoted in the Final Recommended Record of Decision that the "proposed intake structure in the Mattaponi River could cause erosion or accretion of the adjacent marshes." These marshes are nursery grounds and spawning habitats for several fishery species.

Comments on this issue from: Georgetown University Law Center, Institute for Public Representation (October 27 letter, page 6).

Question: Please indicate whether, in your judgment, operation of the water intake as presently proposed would be more, less, or equally likely as the earlier proposal to cause erosion or accretion of adjacent marsh areas in its vicinity if implemented.

C. Issues for MRC relative to project consistency with Enforceable Policy B, Subaqueous Lands Management.

Issue 1. The impact of the pumping hiatus (authorized by the MRC permit) on the minimum in-stream flow requirement of the VWP permit and the frequency with which the hiatus will have to be lifted in order to maintain the safe yield of the reservoir are both unknown. The applicant's scientists concede that the data does not exist to determine these impacts.

Comments on this issue from: Mike Town, Sierra Club letter (page 2, item 2) and Transcript (page 40).

Question: Please indicate whether the minimum in-stream flows and other conditions set out in the VWP permit will conflict with the pumping hiatus and related requirements set out in the MRC permit. If there are conflicts, can these be effectively resolved without violating the current MRC permit?

Issue 2. The chosen intake location poses some of the highest potential risk to juvenile anadromous fish populations. The placement of the intake in tidal water means that there is a high probability that early life stages of fish will be transported back and forth past the intake screen many times by ebb and flood tides. To reduce the risk of undesirable

impacts to fishery resources or to a safe water yield objective, a monitoring program should be completed prior to a final permit decision.

Comments on this issue from: VIMS (June 25, 2004 letter, page 6).

Question: Please indicate how this issue was addressed in considering consistency of the project proposal with the Subaqueous Lands Management enforceable policy.

D. Issues for DCR-DCBLA relative to project consistency with Enforceable Policy I, Coastal Lands Management.

Issue 1. The applicant stated that the project would comply with the Coastal Lands Management Enforceable Policy, because the project is a water-dependent activity under the Chesapeake Bay Preservation Area Designation and Management Regulations (9 VAC 10-20-130). It appears that compliance and enforcement of the Coastal Lands Management Policy are left to local governments, and that King William County's activity in this regard would be "not equipped" to enforce requirements by virtue of its partnership agreement with the applicant locality in the project.

Comments on this issue from: Billy Mills, Mattaponi and Pamunkey Rivers Association (Transcript, pages 44-46).

Question: Please comment on whether the entire project appears consistent with the Regulations. If it does not, how might DCR-DCBLA enforce applicable requirements, and what are they?

Issue 2. GULC-IPR states that the applicant is not in compliance with the Coastal Lands Management Enforceable Policy because several procedural steps that are legally required in order to allow development in a Chesapeake Bay Preservation Area have not been taken by the applicant. Specifically, the applicant proposes to build a reservoir within the County's Chesapeake Bay Preservation Area, but did not conduct the required environmental site assessment or submit a development plan, both of which are among the submissions required to demonstrate that the project is water-dependent, and that non-water-dependent components are located outside of Resource Protection Areas. The applicant has asserted that these requirements are met, but GULC-IPR indicates that the determination on this point belongs to the County, which has not been given an opportunity to make it.

Comments on this issue from: GULC-IPR (October 27 letter, pages 4-5; see also Transcript, Pages 35-37).

Question: Please analyze this issue and indicate whether appropriate steps have been

taken by the applicant, the County, and, if necessary, by DCR-DCBLA to ensure that the project is consistent with the Coastal Lands Management Enforceable Policy.

E. Issues for DCR-DSWC relative to project consistency with Enforceable Policy D, Non-point Source Pollution Control

Issue 1. The applicant has not responded to earlier concerns, voiced by DGIF and the U.S. Fish and Wildlife Service and quoted in the Final Recommended Record of Decision, that the "proposed intake structure in the Mattaponi River could cause erosion or accretion of the adjacent marshes."

Comments on this issue from: GULC-IPR letter, October 27 (page 6).

Question: Please indicate whether, in your judgment, operation of the water intake as presently proposed would be more, less, or equally likely as the earlier proposal to cause erosion or accretion of adjacent marsh areas in its vicinity if implemented.

Issue 2. The applicant has never submitted the Erosion and Sediment Control Plan required by the County's Chesapeake Bay Preservation Area zoning ordinance.

Comments on this issue from: GULC-IPR letter, October 27 (page 6).

Question: Please indicate whether DCR or its Watershed Office has tracked this submission or takes responsibility for it.

Issues relating to Advisory Policies of the VCP

A. Issues for DHR relating to Advisory Policies on Coastal Natural Resource Areas, item h), Underwater Historic Sites

Issue 1. According to GULC-IPR, the applicant asserts, in its April 16, 1999 submission of a federal consistency certification and also its September 15, 2004 submission of a consistency certification update, that with regard to underwater historic sites, the "archaeological studies conducted for the project have not identified any locations sensitive for underwater archaeological sites." This conflicts with the Norfolk District's Final Recommended Record of Decision which stated that the project would cause flooding or excavation of 115 sites, 79 of which were recommended by DHR for further study. In addition, the applicant has ignored the results of an on-going evaluation of the impact of its choice of wetland mitigation sites on the Mattaponi Tribe's historic properties.

Comments on this issue from: Georgetown University Law Center, Institute for Public Representation (October 27 letter, pages 5-6).

Question: Please comment briefly on the results of archaeological studies and indicate whether potential impacts on archaeological resources have been fully considered.

Issue 2. Contrary to the assertion by the applicant, the section 106 process will not adequately mitigate for the flooding of one of the richest areas in the Commonwealth for woodland Indian artifacts. Moreover, as the Final Recommended Record of Decision indicated, the applicant's proposed wetland mitigation plan would harm King William County's historic Indian sites.

Comments on this issue from: Georgetown University Law Center, Institute for Public Representation (October 27 letter, pages 5-6).

Question: Please indicate whether the section 106 process can effectively mitigate flooding or other harm to historic Indian sites and woodland Indian artifacts in the event the proposed project is built and the proposed wetland mitigation plan is carried out. To what extent would historic resources be irretrievably lost in this event?

B. Issues for DCR (Division of Natural Heritage), DGIF, and MRC relating to Advisory Policies on Coastal Natural Resource Areas: item a), Wetlands; item b), Aquatic Spawning, Nursery, and Feeding Grounds; and item e), Significant Wildlife Habitat Areas

Issue 1. The proposed project would include an intake pipe withdrawing as much as a third of the river's flow from the most productive shad spawning area in the entire Chesapeake region. There is a fishing moratorium on shad, the population of which is already severely depleted. The alteration of the flow would alter the salinity of the river; shad are very sensitive to changes in salinity. A change in the river's salinity will disrupt adult spawning behavior, change adult migratory patterns, and damage the marsh plain where young shad feed and seek shelter from predators.

Comments on this issue from: Carl Custalow, Chief, Mattaponi Tribe (Transcript, pages 5-7).

Questions: Please advise whether your agency has made, or will make, any recommendations or determinations regarding the management of Mattaponi River shad habitat. If recommendations have been or will be made, to whom were they, or will they be, addressed? Does this issue affect your evaluation of the proposed project?

Conclusions

Thank you for your assistance in this endeavor. If you have questions, please feel free to call (telephone 698-4488) or send an e-mail (chellis@deq.virginia.gov).